SUPREME COURT, U. S.

Supreme Court, U.S.
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# In the Supreme Court

OF THE

# United States

OCTOBER TERM, 1967

No. 281

WING WA LEE,
*Petitioner,*

vs.

IMMIGRATION AND NATURALIZATION SERVICE,
*Respondent.*

## PETITION FOR A WRIT OF CERTIORARI
## to the United States Court of Appeals
## for the Ninth Circuit

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Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit affirming an order of the Immigration and Naturalization Service denying a motion to reopen.

### JURISDICTION

The judgment of the Court of Appeals was entered on March 28, 1967. Jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## QUESTION PRESENTED

Are crewmen eligible to adjust their status pursuant to section 203(a)(7) of the Immigration and Nationality Act of 1952 as amended?

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## STATUTE INVOLVED

Immigration and Nationality Act, as amended, section 203(a), 8 U.S.C. (1964 ed. Supp. I) 1153(a).

> "(7) Conditional entries shall next be made available by the Attorney General, pursuant to such regulations as he may prescribe and in a number not to exceed 6 percentum of the number specified in section 201(a) (ii), to aliens who satisfy an Immigration and Naturalization Service officer at an examination in any non-Communist or non-Communist-dominated country, (A) that (i) because of persecution or fear of persecution on account of race, religion or political opinion they have fled (I) from any Communist or Communist-dominated country or area, or (II) from any country within the general area of the Middle East, and (ii) are unable or unwilling to return to such country or area on account of race, religion, or political opinion, and (iii) are not nationals of the countries or areas in which their application for conditional entry is made; or (B) that they are persons uprooted by catastrophic natural calamity as defined by the President who are unable to return to their usual place of abode. For the purpose of the foregoing the term 'general area of the Middle East' means the area between and including (1) Libya on the west, (2) Turkey on the north, (3) Pakistan on the east, and (4) Saudi Arabia and Ethiopia on

the south: Provided, That immigrant visas in a number not exceeding one-half the number specified in this paragraph may be made available, in lieu of conditional entries of a like number, to such aliens who have been continuously physically present in the United States for a period of at least two years prior to application for adjustment of status."

Section 245, 8 U.S.C. (1964 ed.) Sec. 1255:

"(a) The status of an alien, other than an alien crewman, who was inspected and admitted or paroled into the United States may be adjusted by the Attorney General, in his discretion and under such regulations as he may prescribe, to that of an alien lawfully admitted for permanent residence if (1) the alien makes an application for such adjustment, (2) the alien is eligible to receive an immigrant visa and is admissible to the United States for permanent residence, and (3) an immigrant visa is immediately available to him at the time his application is approved. * * *"

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## REGULATIONS INVOLVED

Title 8 Code of Federal Regulations [Rev. January 1, 1966]:

Section 245.1 *Eligibility.*

"(a) General. An alien who on arrival in the United States was serving in any capacity on board a vessel or aircraft, or was destined to join a vessel or aircraft in the United States to serve in any capacity thereon, or was not admitted or paroled following inspection by an im-

migration officer is not eligible for the benefits of section 245 of the Act."

* * *

(d) *Immediate relatives under section 201(b) and preference aliens under section 203(a)(1) through 203(a)(7).*

"* * * An alien who claims preference status under the proviso to section 203(a)(7) of the Act is not eligible for the benefits of section 245 of the Act and as provided in section 245.5, unless the District Director has approved the alien's Application for Classification as a Refugee under the Proviso to Section 203(a)(7), Immigration and Nationality Act." [31 F.R. 535, January 15, 1966].

Section 245.4 *Adjustment of status under the proviso section 203(a)(7) of the Act.*

"The provisions of section 245 of the Act and this part shall govern the adjustment of status provided for ir the proviso to section 203(a)(7) of the Act. Processing of applications for adjustment under the proviso to section 203(a)(7) and this section shall be initiated in each district in the chronological order in which the applicants last arrived in the United States. An alien who claims he is entitled to a preference status pursuant to the proviso to section 203(a)(7) of the Act shall execute and attach to his application for adjustment of status Form I-590A, Application for Classification as a Refugee under the proviso to Section 203(a)(7), Immigration and Nationality Act. The determination as to whether an alien is entitled to the claimed preference status shall be made by the district director;

no appeal shall lie from his determination." [31 F.R. 536, January 15, 1966].

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**STATEMENT OF THE CASE**

The petitioner is a native and citizen of China who last entered the United States at Los Angeles on September 30, 1962, as a crewman. He has remained in the United States continuously since that date. He was ordered deported to Formosa or Macao by a special inquiry officer on May 6, 1963. No appeal was taken and the order became final.

However, the respondent was unable to effect deportation to either place, and therefore moved to reopen the proceedings so that an order might be entered for petitioner's deportation to Hong Kong. Petitioner appealed and on July 29, 1965, the Board of Immigration Appeals dismissed petitioner's appeal and affirmed the deportation order to Hong Kong.

Thereafter, on October 3, 1965, the Immigration Laws were amended by P.L. 89-236. Among the amendments were substantial changes in the quota preference system, including section 203(a)(7) which provides for conditional entries into the United States for refugees, and provides further

> "that immigrant visas in a number not exceeding one-half the number specified in this paragraph may be made available, in lieu of conditional entries of a like number, to such aliens who have been continuously physically present in the United States for a period of at least two years prior to *application for adjustment of status.*" (Emphasis added.)

The petitioner moved to reopen the deportation proceedings for the purpose of applying for adjustment of status under section 203(a)(7). The motion to reopen was denied by the Board of Immigration Appeals on June 1, 1966, on the ground that petitioner was not eligible under section 203(a)(7), because section 245 provides that crewmen are ineligible to adjust status.

The Board apparently assumed that the words, "application for adjustment of status," as contained in section 203(a)(7) meant application for adjustment of status under section 245.

Petitioner then sought review of the administrative order in the United States Court of Appeals for the Ninth Circuit. The administrative order was affirmed. (See appendix A.)

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## REASON FOR GRANTING THE WRIT

We are fully aware that this Court on April 24, 1967, denied the petition for a writ of certiorari in a group of cases raising this same question: *Tai Mui v. P. A. Esperdy, as District Director of the Immigration and Naturalization Service for the District of New York,* No. 1037; *Chan Hing* and *Lai Cho v. P. A. Esperdy, as District Director of the Immigration and Naturalization Service for the District of New York,* No. 1038; and *Woo Cheng Hwa v. Immigration and Naturalization Service,* No. 1090.

In those cases counsel did not raise the one issue which we think deserves the Court's attention. We refer to the failure of the Attorney General to distinguish between substantive and procedural requirements in applying section 245 to applications for adjustment of status under section 203(a)(7).

As enacted, section 203(a)(7) provides that aliens who meet two requirements: (1) That they be refugees; and (2) That they have been physically present in the United States for a period of at least two years prior to adjustment of status, may be allocated up to one-half of the quota numbers provided in that section.

This petitioner meets both requirements, but the Attorney General contends that the petitioner cannot qualify under section 203(a)(7) because he entered the United States as a crewman.

Crewmen are ineligible for adjustment of status under the substantive provisions of section 245, and the Attorney General says section 245 is the *procedure* for adjustment in section 203(a)(7) cases.

In support of his position, the Attorney General points out that section 203(a)(7) provides no *procedural* avenue for obtaining relief. This is true. But we would point out that section 13 of the Act of September 11, 1957, provided for adjustment of status and did not provide a procedural avenue for the relief.

The Attorney General found no difficulty in applying the procedural requirements of section 245 to

adjustment of status cases under section 13 of the Act of September 11, 1957, but did not apply the substantive requirements. As a matter of fact, Form I-485, prior to its recent amendment was used for applications for adjustment of status under sections 245, 249, section 13 of the Act of September 11, 1957, and section 203(a)(7). A copy is annexed as appendix B.

The same *procedure*—that of section 245—was followed in all four types of cases, but the substantive requirements were different in each case. And only in section 203(a)(7) cases did the Attorney General attempt to impose the substantive requirements of section 245.

We submit that the Attorney General is improperly imposing a substantive requirement in this case not specifically contained in section 203(a)(7). Certainly, if Congress intended the substantive provisions of section 245 to apply to applications for adjustment of status under section 203(a)(7), they would simply have included the following phrase, "under section 245," at the end of the proviso to section 203(a)(7). But Congress did not do so, and the legislative history of section 203(a)(7), scarce though it might be, does not indicate an intent to apply such a requirement to the section.

It seems clear that Congress meant no more than to apply the *procedural* requirements of section 245 to section 203(a)(7), but whether or not Congress intended to apply the substantive requirements of section 245 to section 203(a)(7), the fact remains that the statute does not include such a provision.

We submit that the Attorney General cannot, by regulation, impose substantive requirements not specifically contained in the statute.

As this Court pointed out in *Dixon v. United States,* 381 U.S. 68, 85 S.Ct. 1301, Congress, and not the Commissioner, prescribes the tax laws, and the power of an administrative officer, or board, to administer a Federal statute and to prescribe rules and regulations to that end is not the power to make law, but the power to adopt regulations to carry into effect the will of Congress *as expressed by the statute.* The Attorney General has attempted to create a rule out of harmony with the expressed language of the statute, and therefore, as in *Dixon v. United States,* supra, it is a nullity.

We should remember that the petitioner, and several hundred other aliens in like circumstances, face deportation to Hong Kong if they are held ineligible under section 203(a)(7). The Attorney General admits that there are no provisions available in the Orient which would permit these aliens to apply for conditional entry under section 203(a)(7). Therefore, these aliens, unlike European refugees, cannot return to the United States as refugees.

In *Fong Haw Tan v. Phelan,* 333 U.S. 6 (1948), and in *Delgadillo v. Carmichael,* 332 U.S. 388, at 391, 68 S.Ct. 10, this Court recognized the harshness of deportation statutes and resolved doubts in the statutory construction in favor of the aliens because deportation is a drastic measure, at times the equivalent of banishment or exile. It is true that the statute

under consideration in this petition is not a deportation statute, but the results are the same.

To construe the statute in such a manner that substantive requirements not specifically included therein bar these aliens from eligibility will cause their deportation—a harsh result—the equivalent of banishment or exile.

Our position is clear. This Court has not permitted administrative construction of statutes which would produce harsh consequences by the imposition of requirements not specifically included in the language of the applicable statute. The Court should not permit such a construction in this case.

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## CONCLUSION

Because of the number of aliens who will be affected by this issue, and the grave consequences that they (including the petitioner) face if the petition is denied, and because of the serious question of statutory construction involved, we respectfully pray that a writ of certiorari issue.

Dated, San Francisco, California,
June 12, 1967.

Respectfully submitted,
MILTON T. SIMMONS,
*Attorney for Petitioner.*

**(Appendices Follow)**